PP

v.

MOHAMAD WAHAB

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL REVISION NO: 43-15-2000]
30 NOVEMBER 2000

CIVIL PROCEDURE: *Jurisdiction - Transfer of case from sessions court to magistrate's court - Whether such transfer valid in law - Whether public prosecutor authorised under art. 145 (3) of Federal Constitution to apply for transfer - Whether sessions judge could tranfer case under s. 104 of Subordinate Courts Act 1948*

The respondent was charged at the sessions court under s. 304 of the Penal Code. However, when the case was called up for mention, the deputy public prosecutor applied for the case to be transferred to the magistrate's court instead. The learned sessions judge then accordingly transferred the case to the magistrate's court. The magistrate doubted the validity of the said transfer. Hence, this application for revision.

The sessions judge referred to art. 145(3) of the Federal Constitution to substantiate her reasons for ordering the transfer. According to the learned judge, the said article authorises the public prosecutor to apply for the transfer. In addition, the learned judge claimed that she was empowered under s. 104 of the Subordinate Courts Act 1948 ('the Act') to make such orders.

Held:

[1] Transfer of proceedings is a matter for which special legislation must be enacted as provided by art. 145(3A) of the Federal Constitution. Section 177 of the Criminal Procedure Code which requires a magistrate to transfer a case to a higher court if the application is made by the public prosecutor is such special legislation. No special law has been enacted to allow a transfer of proceedings from a higher court to a lower court. In the absence of such law being passed, the order of transfer made by the sessions judge was wrong in law.

[2] A court may transfer a case to only another court of co-ordinate jurisdiction. Thus a sessions judge may transfer a case only to another sessions court and a magistrate may likewise transfer a case to only

another magistrate's court as provided by para. 3(2) of the Third Schedule to the Act. Thus, the reliance by the learned sessions judge on s. 104 in making the order of transfer was wrong in law.

[Order set aside and case re-transferred to the sessions court.]

Case(s) referred to:
Cotton Spinning and Weaving Mills Co Ltd v. State of Uttar Pradesh AIR 1961 SC 1170 ***(refd)***
Foo Loke Ying & Anor v. Television Broadcasts Ltd & 2 Ors [1985] 1 CLJ 511 ***(refd)***
Khan Chand v. State of Punjab AIR 1966 Pun 423 ***(refd)***
Nadarajah v. PP [2000] 4 CLJ 634 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 177
Federal Constitution, art. 145(3A)
Penal Code, s. 304A
Subordinate Courts Act 1948, s. 104

For the applicant - Azhar Abdul Hamid, DPP
For the respondent - Khalek Awang; M/s Khalek Awang & Assoc

Reported by Raja Vishnu

JUDGMENT

Augustine Paul J:

This revision proceeding before me brings into focus the power of a sessions court to transfer a criminal case pending before it to the magistrates' court on the application of the public prosecutor.

On 5 May 2000 one Mohamad bin Wahab was charged in the sessions court at Kuala Lumpur for an offence under s. 304A of the Penal Code. When the case was called up for mention the deputy public prosecutor applied for the case to be transferred to the magistrates' court as it falls within the jurisdiction of the latter court. The learned sessions court judge accordingly transferred the case to the magistrates' court. When the case was brought before the learned magistrate he entertained doubts as to whether the sessions court had the power to order the transfer of the case to his court and whether he could, in such circumstances, proceed to hear the case. He promptly wrote to the High Court to consider, in the exercise of its powers of revision, the validity of the order of transfer that had been made. I decided to review the order since it is a matter of considerable significance as it relates to the jurisdiction of the subordinate courts. I then fixed a date to hear arguments from both

parties and also invited the learned sessions court judge to furnish the reasons pursuant to which she had ordered the transfer. Her reasons, in substance, are that the public prosecutor is authorised to make the application for transfer under art. 145(3) of the Federal Constitution ('the constitution') and that she is empowered to make the order by s. 104 of the Subordinate Courts Act 1948 ('the Act').

I shall first consider s. 104 of the Act which reads as follows:

> A Sessions Court Judge or a Magistrate shall have jurisdiction in any criminal cause or matter, whether or not he has jurisdiction finally to hear and determine the same, to order, in any case where the interests of justice so require, that the cause or matter be transferred to any other Sessions Court or Magistrates' Court, as the case may be, which in his opinion has jurisdiction to hear and determine the same, and the same may be continued in that other Court accordingly.
>
> Provided that nothing in this section shall be deemed to confer jurisdiction on any court to which a proceeding is so transferred, if that Court would not otherwise have jurisdiction in respect thereof.

The learned sessions court judge, in making the order, had acted under the impression that s. 104 of the Act permits her to do so. If this interpretation is correct it means that the courts to which a case can be transferred are alternatives which are available to the court making the order of transfer with the result that a sessions court judge may transfer a case either to another sessions court or to a magistrates' court. In order to understand s. 104 of the Act in its proper perspective it is imperative that all the words used in it be taken into account. One of the fundamental principles of statutory interpretation is that it must be presumed that every word used in a statute has been inserted with a purpose and a meaning must be assigned to it. Thus in *Cotton Spinning and Weaving Mills Co Ltd v. State of Uttar Pradesh* AIR 1961 SC 1170 it was held that the Courts always presume, while interpreting statutes, that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. Similarly in *Foo Loke Ying & Anor v. Television Broadcasts Ltd & 2 Ors* [1985] 1 CLJ 511 Abdoolcader SCJ in delivering the judgment of the (then) Supreme Court said at p. 516:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co Ltd v. Vandry* [1929] AC 662, Lord Sumner in delivering the judgment of the Judicial Committee said (at p. 676):

> Secondly, there is no reason why the usual rule should not apply to this as to other statutes – namely, that effect must be given if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain.

The Judicial Committee applied and followed this case in *Enmore Estates Ltd v. Darson* [1970] AC 497 (at page 506).

With this background in mind it must be observed that s. 104 of the Act permits a sessions court judge or a magistrate to transfer a criminal case to another sessions court or magistrates' court, " … as the case may be … " ('the phrase'). The phrase appears to have a determinative effect on the court to which a case can be transferred. What therefore requires consideration is whether the phrase permits the making of an order of transfer by either a sessions court judge or a magistrate to the two courts as alternatives. In explaining the meaning of the phrase and thereby the scope of s. 104 of the Act I can do no better than refer to *Khan Chand v. State of Punjab* AIR 1966 Pun 423 where Narula J said at p 433:

> Keeping the above principle in view we must assume that the legislature has deliberately used the well-known expression "as the case may be" in the proviso in question with some definite purpose and intendment. This expression necessarily means that at least two situations are envisaged by the earlier part of the section and two separate provisions or alternatives are provided in a later part of the same sub-section to one of which the one alternative and to the other of which the other is intended to be applicable. The expression "as the case may be" cannot permit the application of the same alternative to both the contingencies or *vice versa*. It is implicit in the use of this phrase that one out of the various alternatives would apply to one out of the various situations and not otherwise.

The phrase is thus used in s. 104 of the Act with a definite purpose. Its object is to restrict the power of transfer of the court making the order to only one of the two courts to which a case can be transferred, whichever is appropriate and applicable, and not to both as alternatives with a discretion to choose either one of them. The court to which a case can be transferred will be determined by the court making the order for transfer. It is dependent on whether the order for transfer is made by a sessions court judge or a magistrate. The order for transfer is then made to the appropriate court. Thus a sessions court judge may transfer a case only to another sessions court and a magistrate may likewise transfer a case to only another magistrates' court. In other words a court may transfer a case to only another court of co-ordinate jurisdiction. This is precisely what para. 3(2) of the Third Schedule to the Act provides in the following words:

> Power, on application or of its own motion, to transfer any proceedings to another court of co-ordinate jurisdiction.

The reliance by the learned sessions court judge on s. 104 of the Act in making the order of transfer is therefore wrong in law.

The remaining matter for consideration is whether art. 145(3) of the Constitution authorises the public prosecutor to require a case that has been initiated in the sessions court to be transferred to a magistrates' court. I have considered that provision in some detail in *Nadarajah v. PP* [2000] 4 CLJ 634. As I said in that case it is only concerned with the power of the public prosecutor to institute a prosecution in a particular court which has jurisdiction to hear the case. It does not deal with the transfer of a prosecution that has already been instituted. Transfer of proceedings is a matter for which special legislation must be enacted as provided by art. 145(3A) of the Constitution. Thus s. 177 of the Criminal Procedure Code which requires a magistrate to transfer a case to a higher court if the application is made by the public prosecutor must be construed as such special legislation. No special law has, however, been enacted to authorise the public prosecutor to require the transfer of a case from a higher to a lower court. In the absence of any such law having been passed the order of transfer made by the learned sessions court judge is therefore wrong in law.

I must add that in the argument before me the learned deputy public prosecutor conceded that the order made by the learned sessions court judge cannot be supported. He accordingly applied for the case to be re-transferred to the sessions court for further action by the public prosecutor. In the upshot I set aside the order made by the learned sessions court judge and ordered that the case be transferred back to the sessions court.